



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: JULY 20, 2022

IN THE MATTER OF:

Appeal Board No. 622293

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective May 1, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to May 1, 2021 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed March 15, 2022 (), the Administrative Law Judge sustained initial determination.

The claimant and the appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant worked for the employer, a cancer hospital, as an environmental service aide from May 29, 2018 until May 12, 2021. The claimant worked full-time. The employer's policy provides that "an employee who commits acts of violence or who assaults, harass, intimidates, threatens, or otherwise

displays disruptive or aggressive behavior will be subject to corrective action up to and concluding termination of employment."

On April 30, 2021, the staff were retrieving supplies outside of the environmental service office. The claimant took a pack of wet wipes that belonged to another coworker. As the claimant walked away, the coworker pulled the claimant's backpack, which caused the claimant stumble backwards, and the coworker grabbed the wet wipes from her. The claimant turned around pushed the coworker to get her off her. Thereafter the claimant reported the incident to upper management. As the claimant was leaving work, she saw the coworker that attacked her. The claimant said to her coworker from ten feet away, "why are you trying to hurt me. I am not your child." There was no second physical altercation between the claimant and her coworker.

The employer investigated on the matter. The employer spoke with employees who witnessed the incident and reviewed the surveillance of the incident. The employer concluded the claimant violated the workplace violence policy and terminated her employment on May 12, 2021. The claimant had received no prior warnings or discipline for similar infractions.

OPINION: The credible evidence establishes that the employer discharged the claimant on May 12, 2021, because the employer concluded that the claimant engaged in a physical altercation with her coworker on April 30, 2021. While the employer contends that the claimant's conduct was a violation of the employer's policy, not all violations of policy constitute misconduct for unemployment insurance purposes. In the case before us, the claimant did not have any prior warnings or reprimands for committing acts of violence in the workplace. It is also relevant to note that the claimant did not initiate the physical touching between her and her coworker. Rather, the claimant's conduct of pushing her coworker back and away from her was a spontaneous reaction to being pushed. We have previously excused, as a "spontaneous reaction," the actions of a claimant who pushed a coworker after the coworker first pushed the claimant (Appeal Board No. 551256). Although the employer further contended that there was a second incident that occurred later that day where the claimant pushed the coworker again, the employer did not produce a witness at the hearing with firsthand knowledge of a second incident. The claimant was the only individual to give firsthand testimony concerning the employer's contention that there was a second incident and testified that no second incident occurred. Furthermore, the employer also failed to produce video surveillance footage of the alleged second incident. Under these circumstances, we find that the claimant's conduct amounted to an isolated instance of poor judgment and does not rise to the level of misconduct for unemployment insurance purposes. Accordingly, we conclude that the claimant's

employment ended under non-disqualifying circumstances.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determination, disqualifying the claimant from receiving benefits, effective May 1, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to May 1, 2021 cannot be used toward the establishment of a claim for benefits, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER